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Abstract

In *Foreign Affairs and The Constitution,'* Professor Louis Henkin pointed out that one of the important traditional functions of the Constitution, albeit many times overlooked and ignored, has been to limit the actions of our government in the area of foreign relations.

KEYWORDS: tyranny, nuclear, weapons

Nuclear Weapons Policy: The Ultimate Tyranny

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In *Foreign Affairs and The Constitution,*[1] Professor Louis Henkin pointed out that one of the important traditional functions of the Constitution, albeit many times overlooked and ignored, has been to limit the actions of our government in the area of foreign relations. The original conception of democratic life rested primarily on the idea that restraints must be placed upon governmental leaders. The founders of the Republic wanted to prevent the evils of absolute power in foreign affairs. In fact, as Professor Henkin also pointed out,[2] how the Constitution should govern the conduct of foreign affairs was a prominent concern during the deliberations of the constitutional convention. Eventually, Congress was entrusted with the responsibility to declare war, and the President, as Commander-in-Chief, was expected to carry out foreign policy within a framework of law.

Notwithstanding the intent of the framers of the Constitution, courts in the United States have been extremely reluctant to examine questions touching on foreign policy, concluding that such issues are nonjusticiable because the subject matter of foreign relations is entrusted to the discretion of the executive branch of government. In the background of this judicial thinking lurks the notion that the sovereign has unfettered discretion in the area of foreign relations. Ironically, those very same courts continue to uphold the idea that restraint in the domestic sphere is necessary if the courts are to guard society from abuse by the state.

There is no issue more central to the conduct of United States foreign policy than the strategies associated with the threat of use or the actual use of nuclear weapons. Nevertheless, for thirty-seven years,

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1. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).
2. *Id.* at vii.

American legal institutions have been either indifferent to the impact of the nuclear weapons structure on democratic governance or believed that the Constitution has little, if any, role to play in areas of "high policy" such as national security. If there has been any discussion on this subject at all, it is generally claimed by the legal community and policy-makers alike, that the existence of nuclear weapons under the doctrine of deterrence is *the* bulwark of American freedom, which in turn only adds to the enormous responsibilities of the President in the area of foreign policy.

In his article, *Nuclear Weapons and Constitutional Law,*[3] Professor Miller has broken this profound and dangerous silence. By pointing out the serious defects in our governing process caused by our nuclear weapons policy, he refuses to accept the notion that the Constitution is irrelevant to questions of momentous historic importance. His arguments are built upon the idea that if the Constitution was relevant to the formation of our government, it is equally relevant to policies which could destroy the nation. Hence, implicit in Professor Miller's analysis is a well justified belief that the issue of nuclear weapons is of far too great an importance to be the preserve solely of government leaders, foreign policy experts or military professionals. Citizens in general, and the legal community in particular, must be involved in deciding the momentous question of whether there are any rational or moral grounds for using nuclear weapons. The publication of Professor Miller's analysis is particularly gratifying because the inclusion of a legal analysis in answering this question will help create an atmosphere affirming the relevance of democratic standards and processes to the issue of national security and the threat posed by nuclear weapons.

In this regard, Professor Miller's lucid presentation and probing analysis is premised upon an important historic fact — that the most fundamental challenges to established governmental policies have depended upon prior expressions of citizen concern. Traditionally, a legal analysis has been relevant to the scale and grounds of such concern. Certainly, it should not be forgotten that in areas basic to democracy, civil liberties and civil rights, a sense of constitutional entitlement underlay and inspired the recourse to citizen activism which in turn subsequently produced an altered climate enabling adjustments in public

3. Miller, *Nuclear Weapons and Constitutional Law,* 7 NOVA L.J. 21 (1982).

policy and laws.

At this juncture in my comment, I would like to focus and expand upon two especially significant points made by Professor Miller that concern how nuclear weapons challenge our governing process: 1.) the abuse of state power; and 2.) the applicability of international law. For this author, the development, possession, and deployment of nuclear weapons and the government's willingness and readiness to use them has severely undercut some of the most basic traditions and structures of democratic society. This conclusion is derived from two mutually reinforcing circumstances.

The first of these circumstances concerns assumptions of absolute authority by our governmental leaders over the well-being of the citizenry without sufficient accountability in the area of national security. The authority of the President in the area of nuclear weapons policy gives that office unrestrained power over human destiny without an equivalent in human history - that is, the power to cause a global human apocalypse. Certainly, even the most despotic tyrant claiming to rule by divine right never wielded such power.

To say the least, the absolute nature of the power of the President in this area makes a mockery of our democratic standards and processes. Given the democratic traditions of this nation, it would be difficult to imagine a reasonably prudent citizen assenting to the grant of such awesome power to one person or one branch of government when the exercise of that power could spell unparalleled human death and destruction.

Furthermore, the very nature of nuclear weapons forces us to live constantly on the edge of war. Nuclear weapons technology is such that human extinction is only a few minutes away. This technology and the nuclear weapons policies that have evolved since 1945 compel our society to live in a permanent pre-war atmosphere, a permanent state of military mobilization to wage a nuclear conflict. It has been the conventional wisdom that the President as Commander-in-Chief only exercised his emergency battlefield decision-making power during wartime. Now, the President exercises power in "peacetime" that he could only exercise during a war. Consequently, the nuclear national security structure that has emerged over the past thirty-seven years has had the effect of erasing the distinction between the peacetime and wartime powers of the President which are so fundamental to the operation of democratic processes.

Whether the nuclear national security system constructed around deterrence gives rise to a nuclear war or not, that system has also caused the rise of a society based on secrecy and surveillance. To appreciate the incompatability of the government's nuclear weapons policies with the idea of a democratic society, one need only look at the political repression and hysteria associated with the espionage issue of the 1950's. One justification offered at that time by the government for this repression was to prevent the "secret" of the atomic bomb from falling into the hands of a hostile foreign power. How absurd this justification now appears in light of the atomic bomb that was designed as a classroom exercise by a college student using publicly obtainable documents. Even still the government persists in withholding information with which citizens could rationally evaluate the effects and consequences of our nuclear weapons policies as well as engaging in secret surveillance of lawful political activities by the citizenry. The effectiveness of this repression can be evaluated by simply inquiring of the American public whether they are aware of the numerous occasions since 1945 when our foreign policy decision-makers seriously contemplated the threat of use or the use of nuclear weapons in a crisis situation.

The other circumstance which was touched upon briefly by Professor Miller, in arguing that democratic society is being seriously damaged by nuclear weapons, is that nuclear weapons cannot be reconciled with the basic principles of international law.

The prevalent belief among the general public as well as policymakers is that nuclear weapons are legal under international law. The official position of the United States as found in its military manuals is the blanket assertion that a state may do whatever it is not expressly forbidden from doing. Therefore, the United States government argues that since international law has not generated a duly ratified treaty, there is no foundation for contending that nuclear weapons are illegal or prohibited.

However, the legality of nuclear weapons cannot be judged solely by the existence or non-existence of a treaty rule specifically prohibitiong or restricting their use. Any reasonable analysis must take into consideration all the recognized sources of international law — treaties, custom, general principles of law, judicial decisions and the writing of qualified publicists. Of particular relevance in evaluating nuclear weapons are the many treaties and conventions which limit the use of weap-

ons in war; the fundamental distinction between combatant and noncombatant; and the principles of humanity including the prohibition of weapons and tactics that are especially cruel and cause unnecessary suffering. A review of these basic principles supports the conclusion that the threat or use of nuclear weapons pursuant to either a doctrine of massive retaliation, mutual assured destruction, counterforce, or limited nuclear war, is illegal under international law.

Restraints on the conduct of hostilities are traditionally not limited to those given explicit voice in specific treaty stipulations. Aware of the continuous evolution of war technology, the 1907 Hague Regulations contain a general yardstick intended exactly for situations where no specific treaty rule exists to prohibit a new type of weapon or tactic. In such cases, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."[4] Hence, this general rule, known as the Martens Clause, makes the principles of humanity and the dictates of public conscience obligatory by themselves, without the formulation of a treaty specifically prohibiting a new weapon.

Ever since the Declaration of St. Petersburg of 1868,[5] the principles of humanity have been asserted as a legal constraint upon military necessity. The Declaration embodies the twin ground rules of the laws of war: that "the right to adopt means of injuring the enemy is not unlimited"[6] and that "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."[7]

Another basic source of the laws of war is the Hague Conventions

4. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 309 (L. Friedman ed. 1972). For a wider discussion of the Martens Clause see Fried, *The Electronic Battlefield and the Dictates of the Public Conscience,* REVUE BELGE DE DROIT INTERNATIONAL 431-54 (Feb. 1972).

5. Declaration Renouncing the Use in War of Certain Explosive Projectices (1868) which appears in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 4, at 192. *See also* 3 R. PHILLIMORE, INTERNATIONAL LAW 160-62 (3d ed. 1885); 1 AM. J. INT'L L. Supp. 95 (1907).

6. *See* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 4.

7. *Id.*

of 1907,[8] particularly the Regulations embodied in Hague Convention IV. These Regulations are recognized as "the foundation stones of modern law of armed conflict."[9] A fundamental tenet of these Regulations is the prohibition of weapons and tactics which cause wanton or indiscriminate destruction.

It is clear that the use of nuclear weapons in populated areas would result in the indiscriminate and massive slaughter of civilians. Moreover, even if nuclear weapons were used only against an enemy's strategic nuclear forces, the annihilation and extermination of the civilian population would be an inevitable by-product. As the experiences of Hiroshima and Nagasaki amply demonstrate, the effects of nuclear weapons because of their very awesome nature, cannot be limited to military targets. Consequently, the use of nuclear weapons would result in the commission of war crimes on an enormous scale.

The effect of radioactive fallout can also be considered the functional equivalent of the effects of the use of poison gas or bacteriological weapon. The Hague Declaration (IV, 2) concerning Asphyxiating Gases of 1899[10] prohibits projectiles whose sole purpose is the diffusion of asphyxiating gases and the Geneva Gas Protocol of 1925[11] prohibits the use of both poisonous gases and bacteriological weapons. A strong case can be made that human exposure to radiation or radioactive fallout brings nuclear weapons within the ambit of these international conventions. While it is true that nuclear weapons do not produce the bacteria, fungi or living organisms normally associated with bacteriological weapons, it is indisputable that nuclear weapons do alter the chemical structure of humans, plants and animals, as well as producing long-

8. Convention (IV) Respecting The Laws and Customs of War on Land, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 in THE LAWS OF ARMED CONFLICT 57-92 (D. Schindler & J. Toman eds. 1973). *See also* 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

9. DEPARTMENT OF THE AIR FORCE, PAMPHLET NO. 110-31, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ch. 1, at 1 & ch. 5, at 1 (Washington, D.C. 1976).

10. Declaration Concerning Asphyxiating Gases (1899) in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 99-101. *See also* 1 AM. J. INT'L L. Supp. 129, 155 (1907).

11. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 109-20. (1925) *See also,* 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.S.T. 65, 14 I.L.M. 49 (1975).

term genetic effects.

Certainly, both bacteriological and nuclear weapons are potentially weapons of mass destruction with an unprecedented capability to destroy the physical integrity of the planet and to threaten our existence as a species. If the conscience of the international legal community finds the scale of potential effects produced by the use of bacteriological weapons inherently objectionable, then it necessarily follows that the prohibition of their use should be extended to nuclear weapons. In view of the similar potential of each type of weapon for far-reaching destruction, it would be difficult to grasp the legal or moral basis for condemning one, but tolerating the other.

Flowing logically from the requirement that weapons must be used selectively and only against military targets, is the commitment to protect civilians and the elementary distinction between combatants and non-combatants. The principle that civilian populations can never be regarded as military objects is, in fact, "at the very heart of the laws of war."[12] Without the element of discrimination between military and non-military targets, the fundamental distinction between combatants and non-combatants becomes meaningless. Today, the use of nuclear weapons pursuant to either the doctrines of mutual assured destruction, counterforce, or limited nuclear war would result in the indiscriminate and massive slaughter of civilian populations. To recognize the legality of nuclear weapons, given their capacity to terrorize and destroy a civilian population, would be to eliminate virtually the entire thrust and significance of the laws of war.

The universally accepted Geneva Conventions of 1949 reaffirm the distinction between combatant and non-combatant. In particular, "Convention (IV) relative to the Protection of Civilian Persons in Time of War"[13] imposes additional detailed obligations on all belligerents to ensure the essential requirements for the health, safety and sustenance of the civilian population. Given the evidence developed by doctors and

12. R. FALK, L. MEYROWITZ, & J. SANDERSON, NUCLEAR WEAPONS AND INTERNATIONAL LAW 30 (Occasional Paper No. 10, World Order Studies Program, Center of International Studies, Princeton University (1981)). For a further discussion of this point see VI *The Collected Papers of John Bassett Moore,* 153 (Yale ed. 1944).

13. Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 417-512. *See also* 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

scientists as to the medical and environmental consequences of nuclear weapons, it is clear that it would be impossible under conditions of nuclear war to carry out the obligations of the Geneva Conventions, just as it would also be impossible to live up to the dictates of the Hague Conventions — both of which aim at preserving the minimum requirements for the continued survivability and viability of all societies involved in armed conflict.

Complementing the distinction between combatants and noncombatants is the equally important principle that the international destruction of a group of people because of their race, religion or nationality constitutes a crime under international law. This legal innovation, which is embodied in the Nuremberg Principles[14] and underlies the Genocide Convention of 1948,[15] further extended the "principles of humanity" which had earlier been used to determine the legality or illegality of specific weapons.

The deaths resulting from an all-out nuclear exchange between the United States and the Soviet Union are estimated, conservatively, at more then 300 million people. Obviously, the indiscriminate human slaughter resulting from a major nuclear war would dwarf even the awesome genocidal policies enacted by the Nazi government during World War II. Given the destructive power of nuclear weapons and their known radioactive effects, any large-scale use of nuclear weapons would produce consequences clearly contrary to the spirit, if not the letter, of the Nuremberg Principles and the Genocide Convention.

On the basis of these unquestioned principles of international law enumerated above, the United Nations has offered a legal interpretation of the status of nuclear weapons. In 1961, the General Assembly declared in Resolution 1653(XVI) that "any state using nuclear or thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the law of humanity, and as

14. For the text of Principle VI of the Nuremberg Principles which makes punishable as an international crime "crimes against humanity," see THE LAWS OF ARMED CONFLICT, *supra* note 8, at 701-02. *See also* Report of International Law Commission, 2nd Sess. 5 U.N. GAOR. Supp. (No. 12) at iii-22, U.N. Doc. A/13/16 (1950).

15. Convention on the Prevention and Punishment of the Crime of Genocide (1948), in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 163-178. *See also,* 78 U.N.T.S. 277.

committing a crime against mankind and civilization."[16] That Resolution was reaffirmed in subsequent resolutions in 1978 and 1980.[17] As evidenced by these actions of the General Assembly, a consensus has been clearly emerging that the use of nuclear weapons contradicts the fundamental humanitarian principles upon which the international law of war is founded.

Despite the clarity of the fundamental precepts of international law regarding nuclear weapons, there is an influential school of thought claiming that in an era of "total war" even the most fundamental rules can be disregarded in the name of military necessity. Ironically, this view of international law was urged in another context by some of the Nuremberg defendants and indignantly rejected by the International Tribunal.[18] The Tribunal's judgment warns that this "Nazi conception" of total war would destroy the validity of international law altogether. Ultimately, the legitimacy of such a view would exculpate Auschwitz. Military necessity cannot be allowed to justify barbarism.

Even though the laws of war were violated on numerous occasions during World War II by even the Allies, this is not sufficient reason to abandon the laws of war. Rather than ignoring the content of international law, the American legal community needs to restore respect for the limits on state sovereignty set by the laws of war, not validate past disrespect and criminality by cynical claims to the irrelevancy of international law. To that end, it is practical, not idealistic, to take international law seriously. We would be more secure as a people, not less, if our governmental leaders were to try to conform national policy to the minimal obligations of international law. To assume the legality of a weapon with the distinct capability to terrorize and to destroy an entire civilian population makes meaningless the entire effort to limit combat through the laws of war. Global "survivability" is so elemental that the prohibition against nuclear weapons can be reasonably inferred from the existing laws of war. To conclude differently would be to ignore the

16. G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961).

17. Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 33/71-B, 33 U.N. GAOR Supp. (No. 45) at 48, U.N. Doc. A/33/45 (1978); G.A. Res. 35/152-0, 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/35/48 (1980).

18. For the text of the Final Judgment see, 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 171 (1947).

barbaric and nefarious character of the use of nuclear weapons. As the laws of war embody the minimum demands of decency, exempting nuclear weapons from regulatory prohibition would be abandoning even this minimum standard.

In conclusion, we have reached a dramatic stage in our history as a nation where our foreign policy must be carried out within the restraints of constitutional and international law. The demand for an effective legal structure is not quixotic — it is an absolute requirement of survival. Accordingly, a legal challenge gives our courts an important opportunity to "check" the most dangerous of all possible excesses of government which threatens not only the very foundations of our society, but all humanity. Of course, neither legal argument nor legal tactic is alone going to make the significant difference, especially where, as here, they touch sensitively upon prevailing notions of national security. However, it should be remembered that constitutional and international legal principles proved relevant for citizens who sought to question the legality of American policies in Vietnam. The strength of these principles as constraints upon the war-making power of the President cannot be measured by the extent of the adherence on the part of the government alone. The assimilation and acceptance of these constraints at the level of conventional legal wisdom may influence the choice of tactics and policies at official decision-making levels and eventually build support for nuclear disarmament initiatives and a less militarized conception of national security. If we are to protect humanity from drifting further toward nuclear catastrophe, then we in the legal community must expose the incompatability of nuclear weapons with all the values that the Constitution obligates us to preserve. At stake is a democratic society and, indeed, life itself.